No. 2670

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD COMPANY (a corporation),
Plaintiff in Error,

vs.

TAGGART ASTON,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

A. C. HUSTON,
BLACK & CLARK,
Attorneys for Plaintiff in Error.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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At the argument, the court granted permission to the plaintiff in error to supplement its brief by certain references.

We first refer to those portions of the record which we claim wholly contradict the idea that the railroad commission construed its order of August 13, 1912, as permitting the alleged contract in question. *We, of course, do not abandon our position that the statute by its negative provisions and by its use of the word "specified",* is not to *be construed as allowing implications.* The testimony referred to is as follows:

> "Q. With reference to your going to the Railroad Commission for authority to make payments and to disburse money, did you do

that after the contract upon which the payments were made had been entered into and performed in any cases?

* * * * * * * *

A. In *some* instances, the Railroad Commission was consulted.

Mr. BLAKE. Q. How consulted?

A. An *informal consultation;* the matter was discussed with Commissioner Edgerton and his views ascertained; *I cannot recall now of our having made any contract previous to having obtained authority from the Commission.*

Q. Authority in that way?

A. *I don't recall any contract* that we entered into that was required to go to the Commission unless *we first had its consent.*

The COURT. Q. He is not talking about contracts, he is talking about expenditures, incidental expenses and things of that kind.

A. After the order of August 12th—*in its terms it did not authorize, as we thought, the expenditures of our money for current expenses;* the matter was taken up by some members of the board with Mr. Edgerton, *and he told them to proceed and he would ratify it afterwards.*

* * * * * * * *

Q. Then you did make expenditures without the formal authority of the Railroad Commission?

A. We paid our *office* expenses.

Q. Had you no preliminary surveys, or anything of that kind?

A. The preliminary surveys were made before the company was incorporated; subsequent to the incorporation of the company we had some additional surveys made, one, I believe, to Rio Vista, and one from Woodland to Dixon, *under the express authority of the Commission."*

(Tr. pp. 76, 77 and 78.)

(Mr. Edgerton was one of the commissioners.)

Also the following:

"A. The first limitation of any particular consequence as far as these matters are concerned, appears on page 394:

'Construction of the road shall not be entered upon nor liability created nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock $750,000; the proceeds from the sale of said preferred stock shall be used for the following purposes: For the purchase of materials and rolling stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto.'

My first *impression* and construction of that order was that so far as *current* expenses were incurred, we had the implied right to it.

The COURT. I think your construction was correct.

A. (Continuing) And pursuant to that construction of this order, we filed, in accordance with the rules of the Commission, a monthly statement showing our disbursements. *Subsequently the question arose, and Mr. Edgerton suggested that the question could be eliminated by a formal order.* * * * "

An application was made and it was filed before any negotiations were had with plaintiff.

Tr. p. 66 (bottom of page).

The application made was acted upon on September 27, 1913, and the opinion and order of the railroad commission is set forth on pages 67 to 75 of the transcript.

And we ask the court's attention to the rule stated at page 67 of our brief, and to the Texas case, page 65 thereof, showing that even if the law was disregarded in one case it did not excuse its disregard in another.

The additional portions of the record relating to the order of August 13, 1912 (the order in force at the time in question), which we were granted leave to print, are the parts set forth in the opinion of the commission immediately preceding and virtually a part of its order. We quote, as follows:

> *"Hence, we conclude that the commissions shall be paid in proportion as the purchase price is paid in, that is to say,—the salesman shall receive 20 per cent of each cash payment.* **The form of contract for the sale of stock should be submitted for the approval of the commission.**
>
> In order that reasonable assurance be had that the actual construction of this road will not be entered upon before there is sufficient money in hand to warrant proceeding with the scheme, there should be $750,000 paid in on stock before any construction work begins *or any expense other than that incident to the sale of stock is incurred by the company, and title to rights of way should be taken conditioned on the receipt by the company of the above amount of money.*
>
> In order that the commission may assure itself at all times that the money received from the sale of this stock is being properly and judicially expended for the purposes named, we recommend that in addition to a compliance with Order No. 24, applicant be ordered to submit to the commission for its approval *before the execution thereof, all general contracts exceeding the amount $1000.*

Subject to the foregoing conditions we recommend that the application be granted."

(Tr. pp. 62, 63.)

The pertinency of this testimony is apparent from the order, for in the order,—as is quite a usual thing now,—there was a prohibition against incurring liability until certain funds were raised. *The expense of selling stock* was in the order limited to **"commissions as aforesaid".**

The order being absolutely clear, we again call the court's attention to the rule against reading exceptions into a statute unless the contrary construction leads to absurdity (Brief of Plff. in Error, pp. 58, 59 and 67). And we again earnestly insist that the word "specified", repeatedly used in the statute, was used deliberately and that both state courts and federal courts (Brief of Plff. in Error, p. 64) consistently sustain this and similar statutes and give full force and effect to the provisions thereof. And mere inconvenience has never yet been held the equivalent of absurdity.

We were also granted the privilege of locating more completely, for the convenience of the court, certain cases. The California case, Moss v. Smith, 51 Cal. Dec. 125, decided January 29, 1916, which we stated declares that the commission may now determine when and to what extent a public utility may incur debts in excess of its capital stock, or incur bonded indebtedness, is not yet reported in the Pacific Reporter, nor in the California Reports;

and from the local libraries we are unable to give the court any different references to the two Texas cases mentioned at pages 65 and 66 of our brief.

The telegrams mentioned at pages 34 and 35 of our brief are found at pages 54 and 55 of the record.

Dated, San Francisco,
March 25, 1916.

Respectfully submitted,

A. C. Huston,
Black & Clark,
Attorneys for Plaintiff in Error.